

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

NATIONS RENT, INC.

and

**Cases 25-CA-27257-1
25-CA-27257-3
25-CA-27608-1
25-CA-27613-1
25-CA-27686-1 Amended
25-CA-27994-1**

**INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 150,
a/w INTERNATIONAL UNION OF
OPERATING ENGINEERS, AFL-CIO**

Steve Robles, for the General Counsel
Alexia Kulwiec, IUOE Local 150 Legal Department, for the Charging Party
James M. Walters, Fisher & Phillips LLP, for Respondent

SUPPLEMENTAL DECISION

Statement of the Case

MARGARET M. KERN, Administrative Law Judge. This case was tried before me in South Bend, Indiana on June 3 and 4, 2002.¹ A consolidated complaint issued on December 21, 2000, based upon unfair labor practice charges filed on September 29, 2000, by International Union of Operating Engineers, Local 150, a/w International Union of Operating Engineers, AFL-CIO (union) against Nations Rent, Inc. (Respondent). On April 3, 2001, the Regional Director, Region 25, approved a settlement agreement resolving the allegations in the December 2000 complaint. On September 20, 2001, an order partially revoking the settlement agreement and a consolidated complaint issued based upon unfair labor practice charges filed on September 29, 2000, and May 21, May 24, July 2, and July 27, 2001. On November 14, 2001, the Regional Director approved a second settlement agreement resolving the allegations of the September 2001 complaint. On February 28, 2002, an order revoking the second settlement agreement and consolidated complaint issued based upon charges filed on September 29, 2000, May 21, May 24, July 2 and July 27, 2001, and January 4, 2002.

On August 12, 2002, I issued a decision recommending dismissal of the February 28, 2002, complaint on the ground that Respondent had complied with the terms of the second

¹ At the close of the hearing, counsel for the General Counsel requested that the record remain open pending the investigation of a newly filed charge in Case 25-CA-28107-1. That application was denied, and I adhere to that ruling. The record was left open for the purpose of receiving three W-2 forms. Those forms are hereby made a part of this record as ALJ Exhibit 1 (a) through (c).

settlement agreement. On July 29, 2003, the Board reversed and concluded that Respondent had failed to comply with material provisions of the second settlement agreement, and that the Regional Director had acted properly in setting that agreement aside. The Board reinstated the February 28, 2002, complaint and remanded the case to me to consider the presettlement unfair labor practice allegations and to make the necessary findings, analysis, and conclusions.

It is alleged in the February 28, 2002, complaint that since July 2000, Respondent has maintained an unlawful written no-solicitation/no-distribution rule in its employee handbook. It is further alleged that on August 8, 2000, Respondent interrogated an employee and threatened to close the company if employees selected the union as their collective bargaining representative; that on August 8, 2000, Respondent orally promulgated and has since maintained a rule prohibiting employees from talking about the union during working hours, and informed employees they were not to talk with one another and would be kept apart because of their union activities; that on September 6 and 26, 2000, Respondent instructed employees to remove their union buttons and union hats; and that commencing on May 21, 2001, Respondent interfered with the union's ability to engage in lawful picketing. Finally, it is alleged Respondent discharged Jerry Bickel on September 26, 2000, reinstated him on September 27, 2000, issued a written warning to him on April 26, 2001, and discharged him a second time on May 19, 2001, because of his union activities and because he engaged in an unfair labor practice strike. Respondent denies that it engaged in the unfair labor practices alleged.

Findings of Fact

I. Jurisdiction

Respondent admits and I find it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organization Status

Respondent admits and I find the union is a labor organization within the meaning of Section 2(5) of the Act.

III. Alleged Unfair Labor Practices

A. Background

Respondent is engaged in the sale, service, and rental of construction equipment and supplies, and maintains a facility at 1651 Toledo Road, Elkhart, Indiana, the facility involved in this case. Toledo Road runs in an east/west direction, and the facility is located along the south side of the roadway. A chain link fence that surrounds the facility is situated approximately 30 feet from Toledo Road. There are two gated entrances/exits along Toledo Road; the east gate is a 30-foot sliding gate, and the west gate is a 25-foot swing gate. The 30-foot distance between the fence and Toledo Road is surfaced with limestone-gravel paving.

Respondent employs approximately 10 drivers and service employees at the Elkhart facility. Tim Bontrager is a supervisor, Barry Boggs is a district manager, and Alan Stewart is a human resource manager. Respondent admits that these individuals are supervisors and agents of Respondent within the meaning of the Act. Respondent further admits that Dan Olinger was the branch manager and Chad Green was the assistant branch manager until the fall of 2001, and that they were, until that time, supervisors and agents within the meaning of the

Act. Green was promoted to branch manager in September 2001.

On December 17, 2001, Respondent filed a petition for Chapter 11 relief in the Bankruptcy Court, Wilmington, Delaware. That application was still pending at the time of the hearing.

B. The organizing attempt

In late March 2000, organizer Philip Overmeyer asked Bickel, a member of the union, to seek employment at Respondent's facility and, if hired, to organize Respondent's employees. On March 24, 2000, Olinger interviewed and hired Bickel and Bickel began working on April 3, 2000, as a semi-truck driver. From April 3, 2000, to mid-May 2000, Bickel remained covert in his support of the union. On or about May 15, 2000, he began speaking with employees about the union.

On July 7, 2000, Respondent conducted a meeting of employees in its showroom. Among those present were Olinger, Boggs, and Bontrager. The film, "Little Card, Big Trouble," was shown and there was a discussion about the need for a union at Respondent's facility. It was mentioned that there was an organizing drive going on at one of Respondent's facilities in Detroit and that management wanted to stop the union before it came to Elkhart. Ryan Stoll, a mechanic who had been hired two weeks after Bickel, asked why employees couldn't have a retirement plan and an insurance plan like the union's plan. He also asked a question about the pay scale.

On July 13, 2000, Overmeyer met with Bickel and Stoll and both signed authorization cards. After this meeting, Bickel continued to talk to employees about the union. Bickel testified he spoke to employees during lulls in the workday, and he denied interfering with employees' work. On September 18, 2000, Overmeyer sent a letter to Respondent's employees requesting them to attend a meeting on September 25, 2000. The only employee who attended the meeting was Bickel.

C. The employee handbook no-solicitation/no-distribution rule

1. Facts

Respondent publishes and distributes to employees an employee handbook. The most recent edition of the handbook, published in July 2000, contains the following provision at page 34:

Employees may not solicit for organizations, sell goods or services, or distribute catalogs or literature of any kind during working hours, or any time in public areas on Company property. Employees are prohibited from distributing literature of any kind in work areas. Outside third parties are also prohibited from entering Company property to solicit or distribute goods, services, or literature, except as contracted by the Company.

2. Analysis

No solicitation/no distribution rules using the term "working hours" are presumptively invalid because that term connotes periods from the beginning to the end of workshifts, periods that include the employees' own time. *Our Way, Inc.*, 268 NLRB 394 (1983). In this case, the handbook rule prohibits employees from soliciting or distributing literature during working hours and it is presumptively invalid. Respondent has not offered any evidence that it communicated

or applied the rule in such a way that it conveyed to employees a clear intent to permit solicitation or distribution of literature during non-working time. *TeleTech Holdings, Inc.*, 333 NLRB No. 56, sl. op. at 2 (2001). I therefore find the rule violates Section 8(a)(1) of the Act.

5

D. Events of August 8, 2000

1. Facts

10 Bickel and Stoll testified that they frequently wore baseball-type caps to work bearing different corporate logos and they observed other employees wearing similar caps. Prior to the events of this case, neither Bickel nor Stoll had ever been told not to wear these types of caps to work. Both employees also testified that employees regularly engaged in casual, non-work related discussions while they were working, covering such topics as their children, sports, movies and politics. To Bickel's knowledge, no employee was ever told they could not engage in
15 non-work related conversations during working time.

20 On the morning of August 8, 2000, Stoll was in the shop when he was approached by Bontrager and Olinger. They summoned him into Bontrager's office, and the door was closed. Stoll testified that Olinger said he heard Stoll was talking to other employees about the union, and Stoll said yes. Olinger said that Stoll was not allowed to talk to employees during working time and that he was not allowed to talk during breaks or lunchtime. He also said if Stoll tried to bring the union in, Respondent would close the doors and that all a union does is take employees' money.

25 Later that morning, Bickel and Stoll were speaking with one another in the parking lot when Bontrager approached them. Stoll testified that Bontrager said that they were to be kept separate, that they were not to talk with one another, and they were not to talk about the union. Bickel recalled that Bontrager said he was supposed to keep he and Stoll apart, they were not to talk with another, and that Olinger had told Bontrager to keep an eye on them. Bickel and
30 Stoll both testified that when Bontrager thereafter saw them talking with one another, he frequently asked if they were having a union meeting. Neither Bontrager nor Olinger testified.

2. Analysis

35 The applicable test for determining whether the questioning of an employee constitutes an unlawful interrogation is the totality of the circumstances test adopted by the Board in *Rossmore House*, 269 NLRB 1176 (1984), *affd. sub nom. Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The task is to determine whether, under all the circumstances, the questioning at issue would reasonably tend to coerce the employee at whom
40 it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act. *Westwood Heath Care Center*, 330 NLRB No. 141 (2000) and cases cited. Applying these principles, it is clear the conversation in Bontrager's office was coercive. Stoll testified credibly and without contradiction that he was summoned into the office where he met with two supervisors with the door closed. Olinger's comment that he heard Stoll had been
45 talking about the union was immediately followed by an unlawful prohibition against Stoll's right to speak to employees during non-working time, and by a threat to close Respondent's business. Under these circumstances, I find that Olinger unlawfully interrogated Stoll in violation of Section 8(a)(1), unlawfully prohibited him from engaging in solicitation of other employees during non-work time in violation of Section 8(a)(1), and threatened to close Respondent's
50 business in violation of Section 8(a)(1).

With respect to the conversation later that morning, I credit Stoll and Bickel² that Bontrager told them that they would be kept apart from one another, that they were not to talk with another, that they were not to talk about the union, and that thereafter Bontrager would be monitoring their activities. These statements constituted unlawful threats in violation of Section 8(a)(1).

E. Events of September 6, 2000

1. Facts

On September 6, 2000, Stoll wore a union button to work that read, "Be Wise, Organize." Olinger told Stoll, in the presence of Bickel, that he had to remove the button because he was not allowed to advertise for the union on company time.

2. Analysis

Employees have a protected right under Section 7 of the Act to wear union insignia while working. At the same time, employers possess an undisputed right to maintain discipline in their establishments. In adjusting these mutually limiting rights, the Board has long applied the rule that a ban on wearing union insignia violates the Act unless it is justified by special circumstances. *USF Red Star, Inc.*, 339 NLRB No. 54, sl. op. at 3 (2003). I credit Stoll's testimony that on September 6, 2000, he was told by Olinger that he was not allowed to wear a union button on company time. Respondent has not offered evidence of the existence of any special circumstance that would justify this prohibition. Olinger's conduct therefore violated Section 8(a)(1).

F. Events of September 26, 2000: Bickel's first discharge

1. Facts

On September 26, 2000, Bickel, accompanied by Stoll, wore a baseball cap to work with lettering that read, "IUOE, Local 150." ³ Olinger approached them and told Bickel he could not wear the hat. When Bickel asked why, Olinger said that Bickel was insubordinate and that he was in violation of page 34 of the employee handbook. Bickel said it was just a hat, but Olinger stated that it was grounds for termination and that in addition, Bickel was not supposed to speak to anyone or hand out literature during company hours. Bickel asked, "all this for a hat?" Olinger responded, "not for any organizations, that was in the handbook." Green, who was present during this conversation, added that not even a Nike hat could be worn. Bickel asked if he was being fired, and Olinger said, "Terminated, by the handbook." Bickel left the premises. Green, the only witness called by Respondent to testify at the hearing, was not asked about this conversation.

² Although I discredited a portion of Bickel's testimony in my first decision on the issue of his vacation pay, he was a generally credible witness when testifying to the underlying unfair labor practices. His testimony was in large measure uncontradicted by Respondent's witnesses. In addition, his testimony was in some instances corroborated by Stoll, also a credible witness.

³ Stoll had been suspended on September 23, 2000, three days before this incident. His suspension, and his subsequent discharge on September 28, 2000, were resolved in the first settlement agreement.

On the evening of September 26, 2000, Bickel retrieved a phone message left by Barry Boggs. Bickel called Boggs the following morning and Boggs said that he was overriding Olinger's decision to terminate him and Boggs asked if he would be interested in coming back to work. Bickel said yes and he returned to his regular duties on September 28, 2000. He was fully repaid for the time he was not at work. After he returned to work he wore his union hat on a daily basis. For six months following his reinstatement, Bickel worked without incident.

2. Analysis

In *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding cases turning on employer motivation. To prove that an employee was discharged in violation of Section 8(a)(3), the General Counsel must first persuade, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision. If the General Counsel is able to make such a showing, the burden of persuasion shifts "to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089. See also, *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). The elements commonly required to support a finding of discriminatory motivation are union activity, employer knowledge, and employer animus. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991), enfd. mem. 988 F.2d 120 (9th Cir. 1993).

The evidence establishes that on September 26, 2000, Bickel was fired because he wore a union hat to work. Counsel for the General Counsel has satisfied his *Wright Line* burden that Bickel's union activity was the motivating reason for his discharge. Respondent has not put forward any evidence to demonstrate that it would have discharged Bickel on September 26, 2000, absent his union activity. I therefore find Bickel's discharge violated Section 8(a)(1) and (3) of the Act.

I credit Bickel's testimony that on September 26, 2000, he received a message from Boggs offering to reinstate him to work. Bickel accepted that offer and returned to his regular duties on September 28, 2000. It is not disputed that Bickel was made whole for the time he was not at work.

G. Events of April 26, 2001

1. Facts

Bickel testified that on occasion he observed non-work related literature, including a sales catalog and a Chicago Bulls game book, on top of a table in the employee break area. He also observed employees displaying and selling personal items in work areas. One employee displayed a Notre Dame football helmet in the company showroom, and the helmet was purchased by a customer. Another employee was observed, in the presence of Olinger and Bontrager, offering his personal tools for sale in the front counter area of the shop. The same employee was later observed in the service area of the shop trying to sell the same tools. Neither employee was disciplined for engaging in these activities.

On April 25, 2001, Bickel left a copy of a collective bargaining agreement beside another employee's toolbox. It is not clear from the record where the toolbox was located at the time, i.e. in a work area or a non-work area. Bickel passed by the employee and told him he had left something by his toolbox and to take a look at it. Later that day, Bickel saw the employee and Olinger standing together looking at the agreement. The next day, April 26, 2001, Bickel was

given a disciplinary action report by Olinger that read, "soliciting and distributing literature for an organization on company property during working hours. Jerry must stop this immediately." Later that day, Bickel asked Olinger, in the presence of Bontrager, whether the warning meant he could not talk to employees about the benefits of a union. Olinger said it was in the handbook that there could be no solicitation for an organization on company property or on company time, and that if Bickel was talking about an organization, that meant he was not working.

2. Analysis

Contrary to the assertion made in Respondent's brief, there is no evidence that Bickel interfered with any employee's work, or that he failed to perform his own work, when he left the collective bargaining agreement by another employee's toolbox. While it is not clear where the toolbox was located, it is an issue that need not be resolved since even if Bickel left the agreement in a work area, Respondent had a past practice of allowing employees to display personal items in work areas. To have disciplined Bickel for leaving a union contract arguably in a work area, while not having disciplined other employees who left personal items in work areas, Respondent violated Section 8(a)(1) and (3) of the Act.

H. Events of May 19, 2001: Bickel's second discharge

1. Facts

On the morning of May 19, 2001, Bickel told Olinger that he was going out on strike and he handed Olinger a letter stating that the strike was to protest Respondent's unfair labor practices. The letter further stated that Bickel looked forward to returning to work once the dispute was resolved. Bickel testified that at no time did he tell Olinger, or anyone else, that he was quitting or that he intended to quit. The following week, Bickel received a certified letter from Olinger, dated May 19, 2001, which stated, in relevant part, "I acknowledge receipt and accept your letter of resignation effective May 19, 2001." By certified letter dated June 4, 2001, Bickel wrote Olinger that he had not resigned, that he had gone out on an unfair labor practice strike, and that he wished to return to work upon resolution of the dispute.

2. Analysis

I credit Bickel's testimony that on May 19, 2001, he first orally advised Olinger that he was going out on strike, and then handed him a letter restating the same fact. Respondent argues in its brief that Olinger was "under the impression" that Bickel quit. The difficulty with that argument is that Olinger did not testify to his impressions, or to anything else, because he was not called by Respondent as a witness. Bickel's credible testimony is that he clearly conveyed to Olinger he was going out on strike. Olinger's letter to Bickel on May 19, 2001, stating that he was accepting Bickel's "resignation," conveyed the message that participating in a lawful strike was incompatible with continued employment with Respondent. I find Bickel was terminated on May 19, 2001, in violation of Section 8(a)(1) and (3) of the Act.

I. The events of May 21- May 24, 2001

1. Facts

On May 21, 2001, at approximately 6:30 a.m., the union commenced handbilling and picketing at the Elkhart facility with signs that read, "IUOE Local 150 AFL-CIO on strike against Nations Rent for unfair labor practices." Ambulatory picketing was also conducted by two full-

time staff organizers who followed Respondent's trucks from the facility to job sites. Overmeyer testified that he specifically advised the staff organizers conducting the ambulatory picketing not to follow anyone home and Overmeyer testified that no employee was followed home to his knowledge. According to Overmeyer, the reason for the strike was the disciplinary action that had been taken against Bickel.

Records of the Elkhart County Public Safety Communications Center reflect that at 7:47 a.m. on May 21, 2001, a call was received requesting that a police officer respond to the Elkhart facility. Officer James Smith, of the Elkhart County's Sheriff Office, arrived at the facility at 8:30 a.m. and he observed several pickets carrying signs and standing along the south edge of Toledo Road, in the vicinity of the east gate. Officer Smith proceeded to the office where he spoke to Olinger. Olinger wanted to know what the company's rights were with respect to entrances and exits being blocked, and how close the pickets could be to the company's property. Smith said the pickets were allowed to remain within a 15-foot public easement measured from the edge of Toledo Road toward the fence. He also said they were not allowed to block the entrances/exits to the company's property. After speaking with Olinger, Smith went outside and spoke to two of the pickets, neither of whom Smith could identify. According to Smith, he told them they could not block the entrances or exits to the facility, and that they had to remain within the public easement. Smith left the facility at 8:41 a.m.

Robert Barthel is an elderly gentleman who has been retired from the union for 17 years, and he identified himself as one of the pickets to whom Smith spoke on May 21, 2001. Barthel recalled that Smith told him and another picketer that they had to stay within the public easement, and that they should stay at least four feet from the edge of the pavement for their own safety. Barthel recalled the tone of the conversation as congenial.

On May 22, 2001, Overmeyer and Barthel arrived at the facility at about 6:30 a.m. Both testified they observed approximately seven large pieces of construction equipment parked along the outside of the fence and extending into the public easement. According to Barthel, the location of the equipment "made it a little difficult" for the pickets to park their cars, but he managed to park his car at least six feet from the roadway and within the easement. Barthel testified that notwithstanding the presence of the equipment, the pickets had 50 unobstructed square feet within which to picket. Overmeyer agreed that the equipment made parking a little more difficult, but did not in any way hinder picketing activities.

On May 23, 2001, Overmeyer and Barthel again arrived at about 6:30 a.m. and both observed even more pieces of equipment parked outside the fence than had been parked there the day before. Photographs taken that day reflect six large pieces of equipment parked between the west gate and the east gate, and three large pieces of equipment parked west of the west gate. Barthel acknowledged that the presence of the equipment did not prevent the pickets from parking their cars within the easement, nor did it impair their ability to engage in picketing. Overmeyer, on the other hand, testified, "that it was much more difficult for [the pickets] to remain four feet off of the edge of the roadway...it was just dangerous." According to Barthel, a large air compressor was running inside the fence and the noise from the compressor made it almost impossible to engage in conversation.

That same morning, the police communications center received a call at 7:12 a.m. requesting that a police officer respond to Respondent's facility. Officer Smith was again dispatched, and when he arrived at 8:05 a.m., he observed the equipment parked outside the fence. He also observed two pickets standing along the edge of Toledo Road, in the vicinity of the east gate, and one or two cars parked within the public easement. Smith passed through the gate and observed a large diesel-powered generator operating in the yard area of the facility,

within several feet of the inside of the fence. Smith entered the office and spoke to Olinger.⁴ Olinger told him that earlier that morning the pickets' cars had been parked between the easement and the fence, on company property, and that after he called the police the cars had been moved. Olinger said he suspected the pickets had a scanner set to monitor police
 5 communications, and that by using the scanner they were able to move their cars to an area within the easement before the police arrived. Smith testified that Olinger told him that pickets were following trucks to job sites, and that they were following individuals home at night. According to Smith, Olinger "wanted [him] to look into that or ask [the pickets] about that." Smith told Olinger that the generator noise was so loud that he would not be able to talk to the pickets
 10 without shutting it off, and the generator was shut off.

Smith proceeded to talk to two pickets, neither of whom Smith was able to identify. Smith testified that he advised them that a claim was being made that they had moved their cars from where they had been earlier parked outside the easement, and he asked them if they had a
 15 police scanner. The pickets denied having a scanner and offered to allow Smith to search their vehicles, which offer Smith declined. Smith told them that it was a misdemeanor to possess a police scanner and a jailable offense. Smith then asked them if they had been following individuals to job sites and they said they had. He asked them if they had been following individuals to their homes at night and they said they had not. Smith left the facility at 8:22 a.m.

20 Barthel testified that he was one of the pickets to whom Smith spoke on May 23, 2001. Barthel recalled Smith saying that someone had made a call to the police claiming that the pickets had parked their cars on company property, and that after the call had been made, the cars had been moved. According to Barthel, Smith told him that if he parked his car outside the
 25 easement it would be considered trespassing and Barthel could be arrested. Smith also said that someone had suggested that the pickets might have police scanners and that if so, it was illegal under Indiana law and they could be arrested. Smith asked if the pickets were following anyone home, and Barthel said no. According to Barthel, Smith replied that if that happened, it would be considered stalking and they could be arrested. Barthel described the tone of the
 30 conversation as congenial. In his testimony, Barthel acknowledged that he had in fact moved his car about thirty minutes before Smith arrived that morning. He claimed to have parked his car within the easement, but when someone came out to get a piece of equipment, he moved his vehicle out of the way. After the equipment was moved he parked his car back in the same spot.

35 The pickets left Respondent's facility at 4:30 p.m. on May 23, 2001. Overmeyer stayed at the facility until 5:45 p.m., and shortly before he left, he observed several employees come out of the facility and move the equipment back inside the fence. He also observed a straight truck pulling into the facility loaded with scaffolding.

40 On May 24, 2001, Overmeyer arrived at the facility at 5:30 a.m. He observed that scaffolding had been erected across the entire length of the facility on Toledo Road, with the exception of the two gates. The scaffolding was approximately seven feet high and six feet wide, and it was positioned three feet from the roadway. Yellow caution tape was strung along the edge of the scaffolding closest to Toledo Road. The distance from the fence to the
 45 scaffolding was wide enough for a car to drive through. Photographs taken that day show that the public easement was almost entirely blocked by the scaffolding. At first Overmeyer testified there was no place for the pickets to park, but he later admitted that there was a gas station 300 yards east of the facility which had available parking space. Regardless of parking space,

50 ⁴ Respondent acknowledged in its brief that it was Olinger to whom Officer Smith spoke on May 21 and May 23, 2001.

however, Overview testified that in his view it would have been too dangerous for pickets to patrol the three feet of the public easement that remained unobstructed. He sent the pickets home, and no further picketing was conducted.

5 Following May 24, 2001, Overmeyer drove past the facility on a daily basis except Sundays. He observed that the scaffolding remained in place until June 13, 2001 when it was taken down. At no time did he observe anyone utilizing the scaffolding. Nor did he observe equipment parked outside the fence after May 24, 2001. Bickel similarly testified that from
10 December 10, 2001, when he returned to work, up until several weeks before the hearing in this case, he never again observed large pieces of equipment parked outside the fence.

 At the end of January 2002, the union engaged in handbilling at Respondent's facility and erected a 20-foot tall inflatable rat. According to Green, the handbillers stood outside the 15-foot easement, "clearly" on company property. Despite the encroachment, the police were
15 not called and there was no interference with the union's activities.

2. Analysis

a. Respondent's physical interference with picketing

20 The evidence establishes that on May 22, 2001, Respondent parked seven pieces of heavy machinery outside the fence surrounding its facility, in the area where the union had commenced picketing the day before. Respondent did not present any evidence to support a business justification for this action. The following day, May 23, 2001, Respondent parked nine
25 pieces of equipment in the same area, again without business justification. By the morning of May 24, 2001, Respondent had erected scaffolding that almost completely blocked the 15-foot easement running in front of Respondent's property, and that scaffolding remained in place until June 13, 2001. Contrary to Respondent's assertion in its brief, no evidence was adduced that
30 there was a business justification for erecting the scaffolding. Thus, in a series of incremental steps commencing on May 22, 2001, Respondent's interfered with and ultimately completely prevented the union from picketing. The issue is whether Respondent's interest in that strip of property justified its actions.

35 In situations involving a purported conflict between the exercise of rights guaranteed by Section 7 of the Act and private property rights, an employer charged with a denial of union access to its property must meet a threshold burden of establishing that it had, at the time it expelled the union representatives, a property interest that entitled it to exclude individuals from the property. If it fails to do so, there is no actual conflict between private property rights and
40 Section 7 rights, and the employer's actions will be found violative of Section 8(a)(1) of the Act. *Wild Oats Community Markets*, 336 NLRB No. 14 (2001) and cases cited. In determining the character of an employer's property interest, the Board examines relevant record evidence.

45 In this case, there is no evidence as to who actually owns the 15-foot easement. The only evidence as to who had the right to occupy the easement was Officer Smith's interpretation that the 15-foot strip was a public easement that the union representatives had a right to occupy. In the absence of evidence to the contrary, Respondent has failed to show that it possessed an exclusive property interest in the 15-foot strip. Respondent therefore had no right to interfere with or prevent the union's picketing on that property. By placing pieces of heavy equipment within the 15-foot easement on May 22 and 23, and by erecting and maintaining
50 scaffolding on the 15-foot easement from May 24 to June 13, 2001, Respondent interfered with the Section 7 rights of employees in violation of Section 8(a)(1) of the Act.

b. Police involvement

Police Officer Smith credibly testified that on the morning of May 23, 2001, Olinger reported to him that he believed the pickets were in possession of an illegal police scanner, and Smith in turn told the pickets they risked being arrested for such an offense. By failing to call Olinger as a witness, Respondent failed to establish an objective basis for Olinger's claim. By attempting to cause the arrest of the pickets, Respondent interfered with employees Section 7 rights in violation of Section 8(a)(1) of the Act.

Olinger next told Smith that the pickets had parked their cars outside the easement and had trespassed on company property. Again, Respondent offered no evidence to support this allegation. Barthel's uncontradicted testimony was that he had momentarily moved his car that morning from the easement onto Respondent's property in response to Respondent's moving one of the pieces of equipment it had parked outside the fence, an action that was itself unlawful. As soon as the piece of equipment was moved, Barthel moved his car back onto the easement. By attempting to have Police Officer Smith take action against the pickets for trespass when there is no evidence that a trespass had occurred, Respondent violated Section 8(a)(1) of the Act.

Finally, by asking Officer Smith to question the pickets about the ambulatory picketing they were conducting, and about allegedly following individuals home at night, Respondent further violated Section 8(a)(1) of the Act.

J. Affirmative defense of bankruptcy

In its answer, Respondent avers that these proceedings should be held in abeyance because Respondent filed a Chapter 11 petition on December 17, 2001. It is well settled that the institution of bankruptcy proceedings does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to its final disposition. Board proceedings fall within 11 U.S.C. § 362(b)(4) and (5), the exception to the automatic stay provision for proceedings by a governmental unit to enforce its police or regulatory powers. *Isratex, Inc.*, 316 NLRB 135 (1995).

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. The union is a labor organization within the meaning of Section 2(5) of the Act.
3. Since July 2000, Respondent has violated Section 8(a)(1) of the Act by maintaining in effect an unlawful no solicitation/no distribution rule in the employee handbook.
4. On August 8, 2000, Respondent, by Olinger, violated Section 8(a)(1) of the Act by coercively interrogating an employee about his union activities.
5. On August 8, 2000, Respondent, by Olinger, violated Section 8(a)(1) of the Act by prohibiting an employee from engaging in solicitation of other employees during non-work time.

6. On August 8, 2000, Respondent, by Olinger, violated Section 8(a)(1) of the Act by threatening to close the business if employees selected the union as their collective bargaining representative.

7. On August 8, 2000, Respondent, by Bontrager, violated Section 8(a)(1) of the Act by telling employees that they would be kept apart, that they were not allowed to speak with another, that they were not allowed to talk about the union, and that their activities would be monitored.

8. On September 6, 2000, Respondent, by Olinger, violated Section 8(a)(1) of the Act by telling an employee he could not wear a union button while working.

9. On September 26, 2000, Respondent violated Section 8(a)(1) and (3) of the Act by discharging Jerry Bickel because of his union activities.

10. On April 26, 2001, Respondent violated Section 8(a)(1) and (3) of the Act by issuing a written discipline to Jerry Bickel because of his union activities.

11. On May 19, 2001, Respondent violated Section 8(a)(1) and (3) of the Act by discharging Jerry Bickel because of his union activities and because he engaged in a lawful strike.

12. From May 22, 2001 to June 13, 2001, Respondent violated Section 8(a)(1) by interfering with the right of employees to engage in picketing by attempting to cause employees engaged in picketing to be arrested, by requesting the police to question employees about their picketing activities, and by physically blocking the area where picketing was taking place.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

It is not disputed that Jerry Bickel was reinstated and made whole following his first discharge on September 26, 2000, and the Board, in its Decision and Order Remanding dated July 29, 2003, determined that Bickel was properly reinstated and properly made whole following his second discharge on May 19, 2001. I therefore do not include in the remedy an order to reinstate Bickel or to make him whole.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Nations Rent, Inc., Elkhart, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) maintaining in effect, either orally or in writing, a no solicitation/no distribution rule that unlawfully prevents employees from engaging in solicitation or distribution during non-work time;
- (b) coercively interrogating any employee about union support or union activities;
- (c) threatening to close the business because employees engage in activities on behalf of or support the International Union of Operating Engineers, Local 150, a/w International Union of Operating Engineers, AFL-CIO, or any other union;
- (d) telling employees that they would be kept apart, that they would not be allowed to speak with another, that they would not be allowed to talk about the union, and that their activities would be monitored, because of their activities on behalf of, or support for, the International Union of Operating Engineers, Local 150, a/w International Union of Operating Engineers, AFL-CIO, or any other union;
- (e) prohibiting employees from wearing union buttons, union hats, or any other type of union insignia while at work;
- (f) discharging, disciplining, or otherwise discriminating against any employee for supporting the International Union of Operating Engineers, Local 150, a/w International Union of Operating Engineers, AFL-CIO, or any other union;
- (g) discharging or otherwise discriminating against employee for engaging in a lawful strike;
- (h) interfering with the right of employees to engage in picketing by attempting to cause employees engaged in picketing to be arrested, by requesting the police to question employees about their picketing activities, and by physically blocking the area where picketing is taking place.
- (i) in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

- (a) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline and discharges of Jerry Bickel, and within 3 days thereafter, notify Bickel in writing that this has been done and that the discipline and discharges will not be used against him in any way.
- (b) Within 14 days after service by the Region, post at its Elkhart, Indiana facility

copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2000.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: Washington, D.C.

Margaret M. Kern
Administrative Law Judge

⁶ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

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Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

10 The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

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WE WILL NOT maintain in effect, either orally or in writing, a rule that prohibits you from engaging in solicitation or distribution during non-work time.

WE WILL NOT coercively question you about your union support or activities.

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WE WILL NOT threaten to close our business because you support the International Union of Operating Engineers, Local 150, a/w International Union of Operating Engineers, AFL-CIO, or any other union.

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WE WILL NOT tell you that you will be kept apart at work, that you cannot speak with one another, that you cannot talk about a union, or that your activities will be monitored because you support the International Union of Operating Engineers, Local 150, a/w International Union of Operating Engineers, AFL-CIO, or any other union.

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WE WILL NOT prohibit you from wearing union buttons, union hats, or any other type of union insignia while at work.

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WE WILL NOT discharge, discipline, or otherwise discriminate against any of you for supporting the International Union of Operating Engineers, Local 150, a/w International Union of Operating Engineers, AFL-CIO, or any other union.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in a lawful strike.

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WE WILL NOT interfere with your right to engage in lawful picketing by attempting to have you arrested, by requesting the police to question you about your picketing activities, or by physically blocking the area where picketing takes place.

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WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline and discharges of Jerry Bickel, and **WE WILL**, within 3 days thereafter, notify him in writing that this has been done and that the discipline and discharges will not be used against him in any way.

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NATIONS RENT, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

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The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

575 North Pennsylvania Street, Federal Building, Room 238, Indianapolis, IN 46204-1577

(317) 226-7381, Hours: 8:30 a.m. to 5 p.m.

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THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER,(317) 226-7413.

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